

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF OREGON

3 UNITED STATES OF AMERICA, )

4 Plaintiff, )

5 v. )

6 EARL DEVERLE FISHER, )

7 Defendant. )

No. 3:18-cr-00319-JO-02

July 18, 2018

Portland, Oregon

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15 Review of Detention Hearing

16 TRANSCRIPT OF PROCEEDINGS

17 BEFORE THE HONORABLE JOHN V. ACOSTA

18 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE  
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APPEARANCES

FOR THE PLAINTIFF: Ms. Leah K. Bolstad  
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FOR THE DEFENDANT: Mr. Ernest Warren, Jr.  
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1 (P R O C E E D I N G S)

2 (July 18, 2018; 2:21 p.m.)

3 THE COURT: Mr. Warren, do you need time before we  
4 start?

5 MR. WARREN: No, I'm ready to go.

6 THE COURT: Thank you.

7 Mr. Warren, the government filed a written response  
8 to your memo and declaration. Have you had a chance to read  
9 that?

10 MR. WARREN: I have, Your Honor. To supplement our  
11 argument today, I've handed up a copy of the document. I've  
12 already given a copy to the government.

13 If I may approach, I'll be referring to this document  
14 for part of my argument today. (Handing.)

15 THE COURT: Thank you.

16 MR. WARREN: We're ready to proceed, Your Honor.

17 THE COURT: All right. Ms. Bolstad, call the case,  
18 please.

19 MS. BOLSTAD: Thank you, Your Honor.

20 The next matter on the docket is United States v.  
21 Earl Fisher, Case No. 18-cr-319-02, assigned to Judge Jones,  
22 United States v. Earl Fisher. Mr. Fisher is present. He's in  
23 custody. He's represented by counsel, Mr. Warren.

24 He's already made his initial appearance on this  
25 matter, but we're here today on the defense motion for release.

1 And the government opposes that motion. We agree with the  
2 Pretrial Services Office in recommending detention because  
3 there are no conditions or combination of conditions that could  
4 ensure the safety of the community or defendant's appearance in  
5 court.

6 I'm happy to address any concerns the Court might  
7 have.

8 THE COURT: Thank you.

9 Mr. Warren, I've read your document as well, your --  
10 both your motion and your declaration.

11 MR. WARREN: Thank you, Your Honor.

12 THE COURT: I'm looking at the material that you  
13 handed up to the Court just a few moments ago. It has to do  
14 with a state court matter that apparently was assigned to Judge  
15 Dailey --

16 MR. WARREN: That's correct.

17 THE COURT: -- of Multnomah County.

18 MR. WARREN: Yes. Maybe I can give it some context.

19 THE COURT: Sure.

20 MR. WARREN: First of all, one of the things that has  
21 to be proven under 18 U.S.C. Section 3142(f) by clear and  
22 convincing evidence is that my client is a danger to the  
23 community. The government must show not just that the  
24 defendant poses a danger but he is truly a danger.

25 Based on the information that the U.S. Pretrial

1 Services has given, information that is in my memo, and  
2 information that's been provided, certainly that's not met.

3 My client has no prior felony convictions. His --  
4 the bulk of his convictions are all misdemeanor driving  
5 convictions. He does have one 20-year-old -- 23-year-old  
6 misdemeanor assault conviction.

7 One of the things -- the reason why I give you this  
8 judgment from Judge Dailey, one of the things was it was an  
9 unlawful use of a weapon charge. During that case, what  
10 happened was Mr. Fisher talked to the mother -- or the father  
11 of his daughter's children about being rough with his daughter.  
12 He got his throat cut because of that, and basically that's  
13 what that charge was about. He got probation from that charge  
14 and he was terminated two years earlier. So any indication by  
15 the government or Pretrial that he's a problem being supervised  
16 would be ill-advised, because he had five years of probation  
17 and he was terminated two years early.

18 The other thing that we saw and was alleged in the  
19 indictment that was handed to the Court was that one of the  
20 names of the so-called bike gangs was Solution Motorcycle Club.  
21 Well, Solution Motorcycle Club, nonprofit, is also attached to  
22 those documents that was presented to Judge Dailey that allowed  
23 him to get off two years early, and the reason is, this is a  
24 Multnomah County Probation Office-verified community service NA  
25 and AA club. So this is a motorcycle club for clean and sober

1 folks. And he did so many hours of community service there  
2 that this was part of the basis for the reason why he was let  
3 off of probation two years early.

4 Also, I think I handed you, to authenticate it, a  
5 Close Street Supervision request, and Close Street is -- at the  
6 time was the agency that allowed people to be out on pretrial  
7 release when they were pending charges in Multnomah County.

8 And it says there, the nature of the current offense  
9 for which Mr. Fisher pled guilty, it says according to PPD  
10 records -- Portland Police Bureau -- Fisher allegedly went to  
11 the victim's home to confront them about his daughter being out  
12 too late and having her kids at home with a babysitter. Once  
13 at that home, the victim says Fisher kicked in his door --  
14 that's not what he was convicted for -- and then the struggle  
15 ensued and he was stabbed in the neck.

16 Okay. So basically, you know, that's what that case  
17 is all about. Other than that, he has no prior violent crimes,  
18 felonies, and we're talking about misdemeanors that  
19 predominantly are 20 years old.

20 He's willing to use a bracelet monitor. He would  
21 check in with U.S. Pretrial daily. He can do that. His family  
22 is in the courtroom right here lined up with their hands up.

23 They're over there. I didn't know that. I knew  
24 about these (indicating).

25 So, you know, he has a courtroom full of support that

1 would get him to court.

2           This case, this very case has been going on for two  
3 and a half years in state court. The reason we didn't address  
4 release at that time is because of the court procedures over  
5 there, they had not dismissed the charges in state court yet,  
6 so there would have been a hold on him had we tried to pursue  
7 release at that particular time.

8           Next, if we could go to the issue of flight risk.  
9 He's lived in Portland for 49 years. He's never lived anywhere  
10 else. He's a homeowner for ten years. His wife and their  
11 three grandkids live with him.

12           In 2007, as it says -- it's a little bit fuzzy, but I  
13 have the medical records here to authenticate it and I have not  
14 provided them to U.S. Pretrial yet. When he was working as a  
15 roofer, he fell off a roof with his utility belt on and he  
16 broke his back in two places. He lost his kidney. He lost an  
17 eye, and he suffered -- and he suffered traumatic brain injury,  
18 all this from fall. Since that time in 2007, he's been on  
19 Social Security Disability.

20           One of the problems that we have right now is that  
21 the U.S. Marshals Service has him at Columbia County. As soon  
22 as I heard, the day after he was arraigned in front of Your  
23 Honor, he was transferred the next day, and so I wrote to the  
24 U.S. Marshal and told them, look, they can't deal with his  
25 medical issues at Columbia County. Presently at Columbia

1 County, he doesn't get his -- he doesn't get his Neurontin  
2 medication, he doesn't get Tylenol, and they took his  
3 prosthetic back brace, and he's in excruciating pain because of  
4 that, which these same things were provided at MCDC.

5 What the U.S. Marshal told me was this is up to the  
6 government, Ms. Bolstad, so I contacted Ms. Bolstad about this.  
7 And I knew that wasn't true, but I did, and I said, would you  
8 please at least have him here at MCDC, maybe switch him out for  
9 somebody that can go to Columbia County that doesn't have his  
10 health issues, that doesn't have only one kidney, a fractured  
11 back, and doesn't get his medication.

12 And so that's another problem. At least if he was  
13 released to his home, he would get all of these things that he  
14 would need.

15 So summing it up, Your Honor, there's no proof that  
16 he is a threat to the government. We do have a presumption of  
17 innocent on these charges. How the government says that the  
18 bike gang that he's a part of is some bad organization, I don't  
19 know, but we'll figure that out. Not here. And he's not a  
20 flight risk.

21 So we'll do any combination to get him out. He will  
22 put his house up on bond if he has to. Whatever it takes, we  
23 want him out if possible.

24 Thank you, Your Honor.

25 He just wanted me to say that he would come twice a



1 day to see Pretrial if needed to. Thank you.

2 THE COURT: Thank you.

3 Ms. Bolstad, go ahead, please.

4 MS. BOLSTAD: Thank you, Your Honor.

5 I think defense counsel got to the right place at the  
6 end with the clarification that he does have a prior violent  
7 felony. At the beginning I heard Mr. Warren say that the  
8 defendant has no felony convictions, and that's simply not  
9 true. The document he handed you is a felony conviction in  
10 2010 for unlawful use of a weapon. It's a Class C felony.  
11 That's a case in which he was also charged with other crimes  
12 like Burglary 1, an Attempt Assault 1. And that is correct,  
13 it's from an incident in which defendant kicked the door in to  
14 the victim's home. We don't need to relitigate that prior  
15 case. He's already been convicted of the violent offense.

16 Also in the pretrial report, I count 11 failures to  
17 appear over his lengthy criminal history that dates back to  
18 1989. I count ten probation violations. Those two facts are  
19 important, in addition to a third fact: He has at least seven  
20 revocations of supervision, meaning a probation officer got to  
21 the point of saying, I cannot supervise this person, and  
22 recommending that he be revoked from supervision.

23 So those three factors are really important to this  
24 Court's determination about whether there are conditions that  
25 this Court can put into place to assure his appearance in court

1 and the safety of the community.

2 He's got that violent prior conviction. He also has  
3 several arrests for Assault 4, one of which he was convicted  
4 of, but three arrests total. And, of course, he's got this  
5 case, where he's charged with very serious offenses of  
6 kidnapping and murder. And as I wrote in my detention memo,  
7 the specific special factual findings alleged in that  
8 indictment say that Mr. Fisher was involved in intentionally  
9 killing the victim. It's pretty rare to see that kind of  
10 offense in federal court. It's an offense that triggers the  
11 highest federal penalties that we have.

12 Because of that fact and the risk to the community,  
13 and especially the victims that we have in this case, the  
14 witnesses who have testified, the witnesses that he's aware  
15 of -- because he's been pending this same crime for two years  
16 in Multnomah County custody -- we have serious concerns with  
17 obstruction, witness tampering, and retaliation against  
18 witnesses. And that's one of the factors in the Bail Reform  
19 Act that should be of concern to the Court.

20 The indictment contains allegations about the  
21 enterprise of which he belongs as a vice president. That's the  
22 Gypsy Joker Outlaw Motorcycle Club. The manner and means of  
23 that enterprise is to scare people, scare people from  
24 testifying in court, to scare people from following through  
25 with police reports where they allege things like assault. So

1 it's very unsurprising to the government that some of his  
2 crimes went away in the past. This man is a long-term member  
3 of the Gypsy Jokers. He does pose a danger to the community.

4 He is a flight risk because he's facing the most  
5 serious penalties he's ever faced in his life. If convicted of  
6 these offenses, he's facing either a sentence of life  
7 imprisonment or death. That exposure gives him a huge  
8 incentive to flee, so we'd ask the Court to detain him.

9 We agree with the Pretrial report. Pretrial is  
10 recommending detention. The government is recommending  
11 detention.

12 I'm happy to answer any questions you may have.

13 THE COURT: Thank you.

14 Mr. Warren, anything else?

15 MR. WARREN: No, Your Honor, other than there's been  
16 no threats to witnesses in two and a half years as we've  
17 been -- we were ready for trial with this particular case. The  
18 case that -- the charge that she says is a violent charge is  
19 not recognized in federal court as a violent charge. UYW is  
20 not a violent charge.

21 He was put on probation and then probation was  
22 terminated two years early just a few years ago because of his  
23 good conduct.

24 So that's all I have to say about it.

25 THE COURT: Thank you.

1 I've read the motion for release and the declaration  
2 in support of that motion that the defendant filed, and the  
3 government's response, which was filed earlier today. I've  
4 also read the Pretrial Services report regarding this  
5 defendant, which addresses, as pretrial reports typically do,  
6 all of the factors that the Court must consider under the Bail  
7 Reform Act in determining whether to detain or release a  
8 defendant. One of those factors, among the many others to  
9 consider, is, of course, the defendant's prior criminal  
10 history.

11 All right. The charges in this case are very  
12 serious, probably of all of the charges the Court ever sees  
13 during criminal matters, the most serious charge, which  
14 includes murder and kidnapping with the result of death.

15 The defendant's criminal history is extensive and it  
16 begins in 1989. Its consistency throughout the years shows  
17 that there is very few gaps in the yearly chronology in which  
18 the defendant is arrested and convicted or arrested and the  
19 charges are dismissed or probation is imposed.

20 Ms. Bolstad correctly points out that the defendant  
21 has multiple failures to appear, multiple probation violations,  
22 and certainly several if not a handful of revocations of  
23 probation in the past.

24 I'll address one particular point that has come up  
25 twice now in Mr. Fisher's case, once at the initial appearance

1 and again today with respect to his release and the  
2 representation that he would not be a threat to individuals.

3 In Docket No. 22, which is Mr. Warren's declaration  
4 in support of Mr. Fisher's motion for release, paragraph 4,  
5 which begins at the bottom of page 1 states: "There is no risk  
6 that Mr. Fisher will obstruct or attempt to obstruct justice or  
7 threaten, injure, or intimidate, or attempt to threaten,  
8 injure, or intimidate a prospective witness or juror.  
9 Mr. Fisher suffers health conditions that seriously limit his  
10 mobility. In 2007, he fell off a roof and fractured his back."  
11 Apparently there were some serious consequences from that fall  
12 in 2007.

13 In contrast, the documents that were provided to the  
14 Court today by the defendant, as well as the pretrial report  
15 criminal history shows that, as Mr. Warren pointed out, three  
16 years later -- or two years later, Mr. Fisher felt in  
17 sufficiently good condition to confront his son-in-law about  
18 the manner in which he believed his son-in-law was behaving  
19 physically toward his daughter. There doesn't seem to be any  
20 repetition of the history of that incident in which, among  
21 other things, he kicked in the door.

22 If he kicked in the door, and more importantly, if he  
23 felt sufficiently capable physically of confronting his  
24 son-in-law about the treatment of his daughter, it seems to me  
25 that the defendant is of a mind that he is sufficiently capable

1 of confronting other people in other ways about the allegations  
2 in this case, particularly those who might be or are suspected  
3 to be witnesses in the conduct against him.

4 The allegations are very serious. I've read the  
5 allegations. I'm familiar with the case. And the threat, if  
6 convicted, of a life sentence or death if convicted is a  
7 sufficient motivation to cause a defendant to flee.

8 As we know under the Bail Reform Act, it is not  
9 fleeing the jurisdiction that the Court must consider, it is  
10 the defendant's willingness to appear for court appearances.  
11 And as we know in the past, based on the history of other cases  
12 in which a defendant has been a flight risk or proven to be a  
13 flight risk, defendants can hide themselves within the  
14 jurisdiction for many months, if not longer, at a time without  
15 being found.

16 On balance, I find that under the factors I must  
17 consider under the Bail Reform Act, Mr. Fisher is a flight risk  
18 and a danger to the community.

19 Mr. Warren, that is without prejudice for you to seek  
20 a review of detention at a later time if there is additional  
21 new information that you can present to the Court in support of  
22 a release request.

23 MR. WARREN: Thank you, Your Honor.

24 THE COURT: Thank you.

25 (Proceedings concluded at 2:40 p.m.)

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I certify, by signing below, that the foregoing is a correct transcript of the record of proceedings in the above-entitled cause. A transcript without an original signature or conformed signature is not certified.

/s/Bonita J. Shumway

August 16, 2018

BONITA J. SHUMWAY, CSR, RMR, CRR  
Official Court Reporter

DATE